STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TASHON EARL HURELL,

APPELLANT

APPELLATE CASE NO. 2016-000275

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

STATEMENT OF ISSUE ON APPEAL

1.

Whether the court erred by refusing to direct a verdict on all three counts where the state did not present substantial circumstantial evidence placing appellant at the scene of the convenience store robbery, the state's circumstantial evidence only raised a suspicion of appellant's guilt, and the judge incorrectly reasoned the directed verdict standard had changed?

2.

Whether the court erred by allowing Shelby Bradt, the former girlfriend of appellant's brother, to testify appellant's brother was not the masked robber in the convenience store video, since appellant's brother was not on trial, and this evidence was consequently confusing and irrelevant?

3.

Whether the court erred by refusing to declare a mistrial when it was clear the jury was discussing the fact that appellant's sister had inadvertently told the jury that appellant had been in prison as a result of a prior conviction, since appellant's prior record being the subject of jury deliberations constituted conclusive evidence the jury was impermissibly considering it as far as his guilt or innocence in this case?

4.

Whether the court erred by allowing Detective Weaver to testify that appellant started laughing when Detective Weaver showed him a photograph of the sweatshirt the robber wore during the robbery while "holding the victim" in this attempted murder case, since it was irrelevant, and any probative value it had was substantially outweighed by its unduly prejudicial effect?

5.

Whether the court erred by admitting photographs and testimony about red and black shoes, since there was no foundation for this evidence, it therefore was not relevance since the internet "shoes evidence" was not linked to the crime, and it therefore only invited confusing speculation?

STATEMENT OF THE CASE

Appellant was indicted by the Dorchester County Grand Jury for the offenses of attempted murder, armed robbery, and kidnapping. R. 313 – 318. All three charges arose from the June 22, 2014, robbery of the Kangaroo convenience store in Summerville, South Carolina. R. 313 – 318.

Appellant's case was called to trial on February 8, 2016, before the Honorable Edgar W. Dickson, and a jury. John Loy represented appellant. Glenn Justis and Kyle Ward were the Assistant Solicitors. R. 1.

On February 10, 2016, the jury found appellant guilty on all three counts. R. 306, ll. 9-14. Judge Dickson sentenced appellant to thirty-year concurrent sentences on each count. R. 312, ll. 8-16.

This appeal follows.

STATEMENT OF FACTS

Mary Pecorora was the night clerk at the Kangaroo convenience store in Summerville, South Carolina on April 23, 2014. She was working the 11 to 7 pm shift. R. 9, l. 10 – 10, l. 7.

Mary was in the back room gathering supplies when she heard the "buzzer on the door." Mary started walking back into the regular part of the store when she "saw someone coming around the corner [who] had on a mask, had a bat that was raised and he came straight to the door and started yelling at me and [he] hit me in the head." R. 10, ll. 8-17. Mary remembered this man was also cursing at her, and he threatened to "cut my throat." R. 10, ll. 18-22.

Mary said she was forcibly taken to the cash register, she opened it, and the robber grabbed the money. Mary described the robber as "about 5'10", 5'11"; he had on a ski mask and a bandanna, and he had on a jacket with a hood on it. He had on gloves and red shoes . . . he was kind of slender. He wasn't fat . . . he was Afro-American." R. 11, l. 14 – 12, l. 2.

Mary was later shown a lineup, but she was unable to identify the robber. She did identify "a frequent customer," appellant's brother Tramaine, that she saw outside the Kangaroo before her shift started. "He was taller and a little huskier" than the robber. R. 15, ll. 3-18. Mary had reconstructive surgery to her face as a result of getting hit with the bat. R. 17, l. 10 – 19, l. 13.

Bernard Nelson was a Summerville Police Department officer. Nelson was dispatched to the Kangaroo that night. He found Mary lying on the floor, "and rendered aid to her." R. 20, l. 19 – 21, l. 12. Officer Nelson testified that he received information, and he documented it in his report -- that he was told by a man in a nearby apartment complex, Somerset -- that a suspect had driven away in a white Ford Mustang. R. 39, l. 13 – 40, l. 1.

Summerville Police Officer Hobie Williams was the K-9 dog handler. He also responded to the scene of the Kangaroo robbery. R. 48, l. 21 – 50, l. 2. His hound dog picked up a scent, and he went on a trail behind the Kangaroo which led to the Flower Town Baptist Church, which was right next to the Somerset Apartments. R. 50, l. 19 – 51, l. 23.

Officer Williams testified that since there were not sufficient police officers available to set up a perimeter early that morning he abandoned his efforts with the dog. R. 52, l. 2-19. Williams continued to the G-Building of Somerset Apartments, where he came in contact with Lucas Hartman, who was on the second level about downstairs Apartment. G-4. Hartman told Williams that he had seen a black male "with a baseball bat running from the fence line around the F-building to the apartment below him, G-4. Hartman advised Williams that this black male was wearing "a dark tee shirt, baseball cap, and dark shorts." R. 53, l. 16 – 54, l. 8. Williams also confiscated "a dollar bill" that was laying on the ground inside the breezeway of the apartment complex. R. 54, ll. 2-8.

Williams said he knocked on the apartment door at G-4, and appellant's sister Tashima Jones, answered the door. R. 52, l. 22 – 56, l. 8. Williams said he told her there was a robbery in the area, and she allowed him to do a "protective sweep" of her apartment, search it, but nothing of evidentiary value was found. R. 55, l. 22 – 60, l. 14.

Lucas Hartman remembered it was about 1:30 or 2:00 in the morning on April 23, 2014, when he observed this black man with the baseball bat and a backpack. After seeing Hartman, and acknowledging his presence, the man jumped over the balcony in the apartment below Hartman. This man came back out of the downstairs apartment and got into a white vehicle "possibly a Mustang," and he drove away. R. 70, l. 9 – 71, l. 23.

Hartman admitted he told the police that the vehicle the suspect got into was a white Mustang. R. 74, l. 2-4. The state put in much effort throughout the trial to try and establish that Hartman was wrong about the white Mustang. It claimed the vehicle was really a Pontiac Grand Am, which was a car linked to a relative of appellant. R. 74, l. 21 – 76, l. 23.

Detective Michael Weaver also testified he learned from the Department of Motor Vehicles that appellant listed his address as "G-4 Boone Hill Road." R. 96, ll. 10-15. Weaver said appellant's sister, Tashima Jones, and appellant's brother, Traquan Hurell, were the other residents listed for that apartment. Appellant's other brother, Tremaine, the regular customer of the Kangaroo, did not live there. R. 96, ll. 10-17.

Weaver acknowledged that a bat, a bandanna, and red shoes seized from this apartment as a result of a search warrant that was later executed. These items were returned to Jones since they were determined *not to be of any evidentiary value in this case*. R. 98, l. 6 – 99, l. 8.

The Sweatshirt

Detective Weaver said as they were leaving the apartment complex, they noticed a white Pontiac Grand Am in the parking lot. Weaver said the police returned to apartment G-4 to see if anyone was home. The mother of appellant and Tashima Jones answered the door. R. 99, l. 22 – 100, l. 15.

Appellant was on the couch lying down. Defense counsel Loy correctly sensed the state was going to attempt to elicit inadmissible evidence. He asked the jury to be excused. R. 101, l. 3 – 102, l. 17. Out of the presence of the jury, Weaver said that a photograph taken from the videotape of the scene depicted the robber wearing a bright green sweatshirt. Weaver said when he showed the photograph to appellant, appellant "laughed and said who would wear something like that during this [an attempted murder and armed robbery]." R. 102, ll. 7-22. Weaver said he

tried to elicit further information from appellant, but appellant refused to talk to him. R. 102, l. 23 – 103, l. 2.

Defense counsel Loy argued that he did not think this incident was probative "of anything and it's prejudicial." He also said that the fact appellant apparently laughed in the face of bloody pictures when talking about a horrible crime painted him as "cold-hearted or villainous." Defense counsel repeated that it was not relevant evidence, and it was extremely prejudicial. R. 103, l. 3 – 110, l. 17.

The judge said he disagreed with appellant that this incident was going to make appellant look "callously indifferent" to the plight of the injured victim. He allowed Weaver to testify in the presence that he showed appellant the photograph of the sweatshirt from the videotape, and appellant began laughing about the sweatshirt and the incident. R. 109, l. 21 – 112, l. 25.

Other Evidence

Without introducing expert testimony, the state would attempt to raise speculation about appellant's guilt based on shoes he was wearing on his Facebook page, and the use of his prepaid cell phone. Both of these areas of speculation drew defense objections. R. 117, l. 19 – 118, l. 22. From his internet research, Detective Weaver said the shoes on the Facebook "look consistent" with those on the videotape. R. 118, l. 15 – 119, l. 15.

Weaver also said he found it "interesting" that appellant's brother's phone records, showed he was on the phone from 12:21 am until approximately 2:11 am at the time of the early morning robbery. R. 120, l. 4 – 122, l. 10. Weaver said he did not suspect appellant's other brother, Tramaine, was the robber because he was tall and skinny and had a high-pitched voice. "His voice sounded nothing like the person in the video." R. 122, l. 5-10.

Weaver would also speculate about what appellant's cell phone that evening may have shown. Defense counsel objected that Weaver was not an expert in cell towers but the judge said he would allow the cell tower evidence. R. 122, l. 16 – 125, l. 16. Defense counsel said he did not object to the location of the cell tower, but he did object to any lay interpretation of the cell tower evidence because the witness was not qualified. R. 123, l. 18 – 125, l. 20.

Weaver said that appellant's phone was in use at 1:10 am on the day of the robbery. He insinuated the calls were made near appellant's mother's house and the Kangaroo convenience store. R. 126, l. 1 – 129, l. 18. Weaver also said he noticed one call was to a telephone line for the Greyhound Bus line, and that number was in Texas. R. 129, ll. 1-16.

Weaver testified that Mary, the store clerk, could not identify anyone as a suspect from the photo lineup. Weaver denied that his investigation was going nowhere at the time, and he said the police were pursuing other leads. R. 148, l. 7 – 150, l. 17.

Weaver acknowledged that Mary was able to identify appellant's brother, Tramaine, as a "regular customer" at the Kangaroo, but Weaver maintained Tramaine had a much higher voice than the suspect on the videotape of the robbery. R. 151, l. 19 – 152, l. 7.

The following day, the state said it wanted to call Shelby Bradt as a witness to testify she watched the convenience store robbery, and for her to maintain before the jury that appellant's brother, Tramaine, her former boyfriend, was not the robber depicted in the video. R. 154, l. 3 – 156, l. 1. Defense counsel strongly objected to this opinion being offered. Defense counsel noted that this proposed evidence was not offered during the first trial, and that the videotape involved in State v. Fripp involved a bad video tape, and an identification of the suspect. The videotape here was clear, and defense counsel noted that the state here strangely wanted to attempt to "disprove the guilt of other folks. Defense counsel noted Tramaine Hurell was not on

trial in this proceeding and this evidence would only confuse the jury. R. 156, l. 3 – 158, l. 13. Appellant did not put forth any third-party guilt defense, and he simply put the state to its burden of proof. The judge said he was going to allow this evidence over the defense objection. R. 158, l. 14 – 160, l. 6.

Shelby Bradt

Bradt then testified in the presence of the jury that she dated appellant's brother, Tramaine, in April, 2014, at the time of the robbery, and they dated for about three or four months. They both worked together at Captain D's. R. 161, ll. 7-25.

Bradt testified that she had never seen Tramaine wearing the sweatshirt at issue. When a portion of the Kangaroo video tape was played for her, she opined that the person on the tape did not sound "like Tramaine." She also maintained "it doesn't look like him." R. 163, ll. 2-15.

Tashima Jones

Jones identified appellant as her brother. She said appellant was not living with her in April of 2014. R. 164, ll. 12-19. Appellant also did not have a key to her apartment, but she said she saw him "every other day" or sometimes every day. R. 167, ll. 4-18.

The following occurred between the solicitor and Jones.

> Q. Ms. Jones, were you aware that Tashon had listed your address as his address with the department of motor vehicles?
>
> A. *Prior to him getting out from serving some time, yes, I am.* Because at that time my mom was still there.
>
> Q. So this was a while back he had used your address?
>
> A. Yes.
>
> Mr. Loy: Your honor, I think we have a matter of law we need to address.

R. 169, l. 18 – 170, l. 1.

Defense counsel Loy then moved for a mistrial. Counsel noted that the testimony Jones gave told the jury that appellant had a prior conviction, and that he had been incarcerated for a period of time. Counsel argued that was clearly prejudicial, and that a mistrial should be granted. Defense counsel then asked the judge to defer ruling on his mistrial motion while he asked appellant if he wanted a mistrial. R. 171, l. 20 – 176, l. 10. Appellant waived any claim to having a right to a mistrial at that time. R. 175, l. 11- 176, l. 25.

On cross-examination, Jones said law enforcement apparently found a dollar bill near her apartment. She said she was asleep at the time, appellant was not living there, and only her brother, Traquan, and her three year old son were present inside her apartment. R. 182, l. 1-16.

The Sweatshirt

Traquan Hurell was working Bi-Lo in April, 2014 when a couple of detectives came by to talk to him. Traquan remembered that they showed him "a picture of the guy at the gas station." They asked him questions about his brothers, and the type shoes that he wore.

Traquan told the detectives he did not recognize the hoodie the man was wearing in the photograph, and he said the Tasmanian devil on the front of the hoodie was made by Warner Brothers. Traquan told them he did not own a similar hoodie, and he did not own red tennis shoes. Traquan said when the detectives continued to try and question him, he told them "I was not speaking to them. Have a good day." R. 184, ll. 11-25. Traquan then told the jurors he did not know anyone who had a hoodie or jacket similar to the one shown him by the detectives. R. 185, ll. 13-16.

The state then called Detective Mike Weaver and Detective Nick Santana to attempt to impeach Traquan's testimony about the sweatshirt. Weaver said that Traquan told him he was given the sweatshirt by a friend of his in the eighth grade. R. 186, l. 15 – 187, l. 1. This

statement was not recorded, and Weaver said Traquan did not give them an opportunity to write a written statement. R. 187, ll. 14-21.

Santana said that Traquan told them he had been given a similar sweatshirt by a friend in the eighth grade. R. 189, l. 18 – 190, l. 13.

The Shoes and the Internet Testimony

Derek Cheek was an investigator with the solicitor's office that was prosecuting appellant. R. 192, l. 15 – 193, l. 9. Cheek identified a person wearing red and black shoes, which he claimed came from one of four Facebook pages belonging to appellant. R. 193, l. 12 – 194, l. 8. Cheek said he then searched Google and found red and black shoes were being sold from "Champs Sports website." R. 194, l. 13 – 195, l. 7.

Cheek next identified three photographs from the Champs Sports website. R. 194, l. 13 – 196, l. 3. When the prosecutor went to admit exhibits 34-37, defense counsel objected, stating they had no relevance, that there had been no shoes recovered, and that this only invited speculation. The judge overruled the objection. R. 196, ll. 6-16.

Defense counsel also objected to the state's desire to have Cheek testify that the shoes were similar. The judge also overruled this objection, stating that defense counsel could cross-examine the investigator about the shoes. R. 197, l. 4 – 199, l. 5. Cheek said he forwarded these photographs to SLED.

On cross-examination, Cheek admitted the photographs came from the Champs Sports webpage, and that they could have come from any of a number of different shoe companies. Cheek acknowledged he thought that there were probably "millions" of models of shoes that came in red and black. R. 202, l. 1 – 207, l. 21.

Samuel Stewart was a SLED DNA worker. He received his Bachelor's degree in biology from Francis Marion University. He had testified ten times before this trial. R. 208, l. 19 – 209, l. 9. Stewart maintained that the blood on the one dollar bill found near the apartment occupied by Ms. Jones was a DNA match of one in one hundred thirty trillion to the victim. R. 213, l. 11 – 215, l. 10.

Directed Verdict Motion

Defense counsel Loy made a very extended directed verdict motion. R. 218, l. 10 – 231, l. 12. Defense counsel argued there was much more evidence against the defendant in State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), where the Supreme Court held the defendant was entitled to a directed verdict. R. 218, l. 10 – 222, l. 16.

In Bostick, the victim lived right next door to the defendant. She was murdered and her house was set on fire. The defendant had a nearby burn pile on his property, and the victim's keys and other effects were found in the burn pile. Gasoline was used as an accelerant to destroy the victim's personal property, and the defendant's mother said she never used gasoline in the burn pile. R. 218, l. 10 – 222, l. 16.

In addition, Bostick had gasoline on his shoes, and the blood on his clothes could not eliminate the victim. In the face of all this evidence, the Supreme Court said it was not "substantial circumstantial evidence." R. 218, l. 10 – 222, l. 16.

Defense counsel correctly argued the Supreme Court in Bostick cited other cases where a directed verdict was granted because the evidence did not rise to the level of "substantial circumstantial evidence", even though there was an abundance of evidence of the defendant's guilt. These cases were State v. Schrock, 283 S.C. 129, 322, S.E.2d. 450 (1984); State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), and State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126

(2000). In each of these three cases, the circumstantial evidence was stronger than the circumstantial evidence against appellant in this case. Yet, the Supreme Court in each of the three cases ruled a directed verdict should have been issued. R. 222, l. 12 – 226, l. 13.

Defense counsel correctly argued that the state's evidence here only raised a suspicion that appellant committed the armed robbery, attempted murder, and kidnapping at the Kangaroo that early morning. R. 218, l. 18 – 229, l. 13. Further, defense counsel correctly argued this was not "substantial circumstantial evidence." R. 229, l. 14 – 231, l. 12.

The judge and the attorneys also discussed State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). In Bennett, the defendant's fingerprint was taken from a television set in the community room in that burglary case, and his blood was found at the scene also. However, the director of the center testified she would monitor Bennett whenever he came to the center, and he spent his time in the computer room, and he did not use other rooms, including the community room. The Supreme Court found that the directed verdict motion was properly denied because forensic evidence placed Bennett at the scene, and specifically, in the room where the crime occurred. R. 227, l. 5 – 232, l. 1.

Defense counsel noted that Bennett was actually a helpful case to the defense here since there was no forensic or other evidence at the scene of the crime which linked appellant to the Kangaroo robbery. As stated, the judge denied the directed verdict motion.

However, the judge rejected the defense argument on the correct directed verdict standard, stating he found there was the "existence of evidence that a reasonable juror could believe if they believed every step in the chain of circumstantial evidence that the state has presented." The judge stated his belief that Bennett apparently changed the underlying standard from the other cases, including State v. Bostick, cited by defense counsel. R. 230, l. 6 – 231, l.

12. In addition to their not being substantial circumstantial evidence of appellant's guilt in this case, the judge made an error of law by applying the wrong standard at the directed verdict stage.

ARGUMENT

1.

The court erred by refusing to direct a verdict on all three counts where the state did not present substantial circumstantial evidence placing appellant at the scene of the convenience store robbery, the state's circumstantial evidence only raised a suspicion of appellant's guilt, and the judge incorrectly reasoned the directed verdict standard had changed.

If ever there was a case where the state sought a verdict based on speculation and suspicion, it was this case. The first trial ended in a hung jury, apparently one in appellant's favor. Therefore, the state had the former girlfriend of appellant's brother testify that the man in the Kangaroo video was not her former boyfriend.

Without the use of an expert, the state offered cell tower lay testimony allegedly placing appellant and his brother near the Kangaroo convenience store that evening, even though the state went to length to show appellant's brother was not the robber, but at the same time insinuating he may have "been in" on the robbery.

The state also offered testimony that appellant laughed when shown the shirt worn by the robber who beat the helpless store clerk. This was calculated to show appellant was a cold hearted person of bad character. In addition, the state offered further speculation about the shoes of appellant on Facebook, and shoes found from a Google search. Defense counsel correctly argued there was no foundation for this irrelevant evidence.

The state also attempted to make much of the fact that a one dollar bill with the alleged match by DNA to the victim was found in a courtyard somewhere near the apartment occupied by appellant's sister.

This evidence did not rise to the level of "substantial circumstantial evidence" under the cases cited by defense counsel Loy during his extended directed verdict motion. Further, it appears that the trial judge thought that State v. Bennett changed the directed verdict standard to determining whether the evidence presented "is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt."

The judge cited the "phone records," the tee shirt, which the judge acknowledged involved conflicting evidence, and he denied the motion because he thought there was "*the existence of evidence that a reasonable juror could believe if they believe every step in the chain of circumstantial evidence that the state has presented.*" R. 230, l. 6 – 231, l. 11. (emphasis added). The correct standard was whether the state presented "substantial circumstantial evidence" under State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011); State v. Schrock, 283 S.C. 129, 322, S.E.2d. 450 (1984), and State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000).

Applying the correct "substantial circumstantial evidence" standard, the state failed to meet that standard in this case, and the judge should have directed the verdict. The state offered evidence that could raise a suspicion of appellant's guilt in this case, but that is all. Given applicable precedent, the state failed to meet its "substantial circumstantial evidence" burden to overcome a directed verdict motion, and this court should now issue an order of acquittal given the lack of substantial circumstantial evidence. In addition, the judge committed an error of law by applying the wrong directed verdict standard despite defense counsel's extremely long directed verdict motion to the contrary.

2.

The court erred by allowing Shelby Bradt, the former girlfriend of appellant's brother, to testify appellant's brother was not the masked robber in the convenience store videotape, since appellant's brother was not on trial, and this evidence was consequently confusing and irrelevant.

As seen, the solicitor sought to have Tramaine Hurell's formeer girlfriend, Shelby Bradt, testify that she reviewed the videotape of the Kangaroo robbery and the aggravated battery. She would then give her opinion that the man on the videotape was *not* Tramaine. She was dating Tramaine at the time of the robbery, had dated him for three or four months before it ended. The solicitor said Bradt would testify that she had reviewed a family picture, she knew the family, she watched the videotape, and that she could opine the masked man in the video was not Tramaine. R. 154, l. 7 – 159, l. 12.

Defense counsel objected to this procedure, arguing it would be improper for Bradt to give her opinion as a layperson that the man in the video was not Tramaine. Defense counsel also argued he did not think it was proper for the state to attempt to prove the guilt of appellant, and simultaneously attempt *to disprove the guilt of others*. R. 154, l. 7 – 159, l. 12.

Tramaine Hurell was not on trial, and this evidence would confuse the jury from its real function of deciding whether or not the state had produced sufficient evidence to prove appellant's guilt beyond a reasonable doubt. Defense counsel asked where this procedure logically ended -- meaning whether the state could attempt to disprove the guilt of others who lived in Somerset Apartments, where the dollar bill was found with the victim's DNA on it was found in the Apartment breezeway. R. 156, l. 3 – 158, l. 13.

The judge said that the videotape involved in State v. Fripp, 396 S.C. 434, 721 S.E.2d 465 (2012), which the solicitor relied on, concerned the defendant on trial. In Fripp, the

videotape was not clear, and the suspect sought to obscure his identity by wearing a hood and his jacket up high on his face.

The judge here apparently reasoned, since this was a circumstantial evidence case, "I think the state almost has to try and prove who else in the house would not be a victim [defendant?] And we've already had testimony that somebody it wasn't Tramaine because Tramaine is taller and his voice is different according to the testimony I heard." The judge said he would therefore allow this testimony and opinion from Bradt that it was not Tramaine, appellant's brother, on the videotape, and he cited State v. Fripp as the authority. R. 158, l. 14 – 159, l. 8.

Discussion

In State v. Fripp, this Court held it was not error for the judge to allow two witnesses, Brown and Young, to testify that Defendant Fripp was the person depicted on the surveillance videotape. They knew Fripp from other occasions.

This Court reasoned the identifications were proper pursuant to Rule 701, SCRE, which allowed a layperson's testimony in the form of an opinion or inference which was (a) rationally related based on a perception of the witness, (b) or helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Defense counsel here correctly argued that seeking to disprove that appellant's brother, Tramaine, was not the robber was going to be confusing to the jury. Tramaine was not on trial. It was not a fact in issue under subsection (b) of Rule 701, SCRE. It was not relevant, and consequently confusing.

This was a distraction, as defense counsel correctly argued, from the jury's only function, which was to determine whether appellant's guilt had been proved beyond a reasonable doubt. This testimony was especially confusing, given the other evidence in this case. It seemed the state was strongly insinuating that one of the brothers may have been conversing with appellant by telephone, and letting him know what was happening at the Kangaroo on the night of the murder. Yet the brother was not charged. Appellant was not putting forth a defense of third-party guilt, and this attempt to "disprove third-party guilt" was therefore in response to nothing raised by the defense. It was improper because it was not relevant as a starting point.

Further, Rule 403, SCRE, also excludes evidence that is likely to cause confusion, as was the attempt to disprove Tramaine's guilt evidence from the videotape by Brandt in this case. Appellant realizes the state was "pulling out all of the stops," given the hung jury in the first trial. This confusing evidence regarding about a third party -- who was not on trial, and not the target of third-party guilt evidence -- was highly improper. The judge's reason for allowing it was, most respectfully, rather odd. Appellant should be granted a new trial.

3.

The court erred by refusing to declare a mistrial when it was clear the jury was discussing the fact that appellant's sister had inadvertently told the jury that appellant had been in prison as a result of a prior conviction, since appellant's prior record being the subject of jury deliberations constituted conclusive evidence the jury was impermissibly considering it as far as his guilt or innocence in this case.

As seen, appellant's sister, Tashima Jones, testified that appellant did not live with her. She testified that the police returned the items seized from her apartment because they did not have any evidentiary value. That was undisputed. She also testified that appellant lived in their mother's house. R. 164, l. 12 – 168, l. 10.

The solicitor asked Ms. Jones if she was aware that appellant listed her apartment as his address with the Department of Motor Vehicles. The sister responded that "*prior to him getting out from serving some time, yes, I am.* Because at that time my mom was still there." Defense counsel immediately told the judge he had a matter of law. R. 169, l. 18 – 170, l. 6. (emphasis added). Defense counsel moved for a mistrial, since the jury now knew appellant had a prior conviction and that he had spent time incarcerated as a result of that conviction. The solicitor responded he did not elicit that answer, and defense counsel then asked permission to talk to appellant about whether he wished to have a mistrial at that point. As will be seen *infra*, this testimony made quite an impression on the jury. R. 170, l. 9 – 171, l. 7.

Defense counsel Loy then told the judge that appellant wished to waive a ruling granting a mistrial at that time. R. 173, l. 11 – 177, l. 24.

As also seen above, during jury deliberation, the jury sent its note, number five, stating it would "like to review the sister's testimony. Did she say when he got out he sometimes stayed

with her?" Defense counsel told the judge that the jury put "when he got out in parentheses," which showed the jury had focused its attention on appellant's prior record, and his prior incarceration. Circumstances had now changed from the prior mistrial motion and defense counsel Loy asked for a mistrial. Defense counsel argued it was manifestly unfair for the jury to be deliberating about appellant's prior incarceration and his prior record. R. 281, l. 20 – 282, l. 18.

The solicitor argued that the jury subsequently sent another note asking the judge to disregard its last note. It would seem apparent the jury realized in the interim the problem. The judge denied the motion for a mistrial but he stated: "I think you've made a compelling argument." R. 284, l. 10 – 285, l. 11.

Discussion

If appellant had testified, and been impeached with his prior record, it is elementary that the court would have given a limiting instruction that the jury could only consider the prior conviction as it went to his credibility. It had no relevance to whether or not he committed the crime in this case. Any such speculation would be totally improper.

Yet, appellant had the worst of all worlds in this case, since he did not testify. Therefore, there was no curative instruction. One obvious advantage of not testifying is that the jury does not learn of your prior record. It was clear here the jury was deliberating about appellant's prior record.

This was a very close case to say the least. It is not too much to state that the improper use by the jury of appellant's prior record and his prior incarceration likely tipped the scales in favor of conviction. That was fundamentally unfair.

In Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000), the Court noted that at times even a limiting instruction cannot cure the prejudice from the admission of improper prior criminal offenses evidence. In this case, appellant's sister clearly conveyed to the jury that appellant had a prior criminal offense, and that he had been incarcerated. It was so clearly conveyed that the jury felt emboldened to want to listen to the sister's testimony again and inquire some more about appellant's criminal record.

In the context of a prior similar offense, the Court has noted "the jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that the defendant committed the similar offense for which he is currently being charged." United States v. Beahm, 664 Fed.2d 414, 418-19 (4th Cir. 1981).

It is common sense that if a person committed a prior criminal offense, or a prior similar offense, that he or she was more likely to be guilty of the crime charged than a person with no criminal record. It is that very human reaction to prior offenses that the rules of evidence must guard against if a defendant is to have a fair trial for the offense for which he is on trial. Our rules of evidence carefully control when a prior criminal conviction may come before the jury. See, Rule 609(a)(1) & (2). The same is true regarding the admission of "other bad acts" that are not the subject of a conviction. See, State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); Illinois v. Somerville, 410 U.S. 458 (1973); Rule 404(b), SCRE.

Appellant did not seek a mistrial when his sister informed the jury that he had a prior criminal conviction and that he had been incarcerated. As defense counsel argued, once it was clear the jury was considering his prior criminal record during deliberation, the matter had gone beyond any limit of reason at that point, and the judge respectfully erred by refusing to declare a

mistrial. See Illinois v. Somerville, 410 U.S. 458 (1973). Appellant should be granted a new trial.

4.

The court erred by allowing Detective Weaver to testify that appellant started laughing when Detective Weaver showed him a photograph of the sweatshirt the robber wore during the robbery while he was "holding the victim" in this attempted murder case, since it was irrelevant, and any probative value it had was substantially outweighed by its unduly prejudicial effect.

As seen, Summerville Detective Mike Weaver testified the police learned from the DMV that appellant listed his address as G-4 Boone Hill Road. R. 96, ll. 10-17. Weaver testified the police obtained a search warrant "based on the statement a suspect actually went in and out of the apartment two times, I found that odd." A police officer "showed up approximately an hour to two hours later with that search warrant." No one was home and the apartment was searched in their absence. As earlier stated, nothing of evidentiary value was found.

Weaver said after the police returned the key to the manager, they noticed a white Pontiac Grand Am in front of apartment G-4. R. 99, ll. 5-21. Weaver knocked on the door, and appellant's mother, Jana Hurell, answered the door. R. 100, ll. 1-2. Weaver testified appellant was laying on the couch at the time. R. 101, ll. 5-7. At this point, defense counsel Loy took up a matter of law.

During the proffer, Weaver testified he had a photograph "from behind the cash register when the incident was going on. You could see a brief description of the sweatshirt. It was a bright green sweatshirt that the suspect was wearing. I wanted to see if he [appellant] recognized it as anyone wearing a shirt similar to that in the area." R. 102, ll. 10-17. Weaver said appellant laughed and said "who would wear something like that during this [violent crime]?" R. 102, ll. 20-22.

Defense counsel argued that the proffered evidence that appellant laughed when shown the photograph of the crime scene video was an attempt by the solicitor to paint appellant as "cold-hearted and villainous." It was not relevant to any issue in the case and it was unduly prejudicial to paint appellant out as a cold-hearted villain. R. 103, l. 3 – 105, l. 2.

The judge told defense counsel: "If I were in your position, I'd probably be worried about that." Nonetheless, the judge stated he did not think the exchange with Weaver made appellant look callously "indifferent." The judge ruled he would admit the part of the proffer concerning appellant laughing at the crime scene photograph. R. 109, l. 23 – 110, l. 19.

In the presence of the jury, Weaver said he showed the photograph which depicted a still photograph of the incident with the suspect standing "there holding the victim. It was a side picture of the sweatshirt. It was unique, just the colors on it." R. 112, ll. 8-18. Weaver testified appellant laughed when shown the photograph and asked why someone would wear "a green and white sweatshirt during something like this [a violent crime]."[1] R. 112, ll. 19-22.

Discussion

"Character may be interjected into the case intentionally or accidentally, and it may be introduced in a number of ways." Collins, South Carolina Evidence, §10.1 at p. 276 (2d ed. 2000). Here, defense counsel correctly objected that evidence appellant laughed when shown the crime scene photograph painted him out to be a cold-hearted person and a villain. Someone who would laugh at another person's misfortune, where the solicitor knew the jury would learn the victim was badly hurt during the incident, and required reconstructive surgery, was surely going to cast the defendant in a negative light in the eyes of the jury.

---

[1] Undersigned counsel could not determine from the transcript nor from the index the exact exhibit number that was assigned to this still photograph. Unfortunately, counsel therefore had to designate all photographs, the video tape, and all still shots to ensure the correct exhibit was before this court.

Bad character evidence can be interjected into the case in subtle and not so subtle ways. For example, evidence of the type of people a person associates with can interject his character into the case. State v. Gilstrap, 149 S.C. 445, 147 S.E. 600 (1929); State v. Marlowe, 120 S.C. 205, 112 S.E. 921 (1922).

Other types of character evidence include evidence of a person's unrelated sexual activity. South Carolina Department of Social Services v. Brown, 272 S.C. 568, 253 S.E.2d 100 (1979). Evidence of a person's general reputation for solvency or insolvency. Garrett v. Weinberg, 59 S.C. 162, 37 S.E. 51 (1900). Evidence a person has been previously jailed on unspecified charges is also evidence of bad character. Jeter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991).

This evidence was not relevant under Rule 401, SCRE, because it did not make any matter at issue more or less likely. It was gratuitous bad character evidence, as defense counsel described, to point appellant out as a cold-hearted, mean person.

If the state wanted the jury to draw any conclusion from this evidence it was that appellant was a cold-hearted person who would laugh at a crime scene photograph, which made it more likely he was the "type of person" who would commit such a crime. That is why such evidence is inadmissible in a criminal trial, because it is extraordinarily prejudicial and may be used for the wrong purpose. See Rule 403, SCRE; Rule 404(a), SCRE.

5.

The court erred by admitting photographs and testimony about red and black shoes, since there was no foundation for this evidence, it therefore was not relevance since the internet "shoes evidence" was not linked to the crime, and it therefore only invited confusing speculation.

As seen, the solicitor used his investigator, Derek Cheek, to introduce the strange internet red and black shoes evidence. R. 192, l. 15 – 193, l. 9. Cheek identified a person wearing such shoes which came from one of four Facebook pages belonging to appellant. Cheek searched Google and found such shoes being sold from "Champs Sports website." R. 194, l. 13 – 195, l. 7.

When the solicitor went to introduce State's Exhibits 34 – 37, defense counsel objected, arguing they had no relevance, that there had been no shoes recovered, and this evidence only invited speculation. Those objections were overruled. R. 196, ll. 6-16.

Defense counsel also objected to the state's desire to have Cheek testify the shoes were similar. That objection was also overruled. The judge ruled these were all proper matters for cross-examination. R. 197, l. 5 – 199, l. 5. Cheek offered that the photographs were forwarded to SLED

Cheek admitted on cross-examination there were likely "millions" of models of similar shoes in red and black. He acknowledged the photographs came off the website -- the Champs Sports webpage -- that he Googled. R. 202, l. 1 – 207, l. 21.

Discussion

The shoes evidence was not linked to the crime, and there was no foundation for this evidence. Once again, the state was asking the jury to engage in speculation and it successfully hoped that a sufficient amount of such speculation would lead to a conviction.

What the solicitor's investigator found on Google from Champs Sports site did not make any matter at issue more or less probable. The evidence was simply not relevant under Rule 401, SCRE. Since it would only confuse the jury and invite speculation, it should have been excluded under Rule 403, SCRE, even if it was relevant. "Evidence which assists the jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). Evidence is incompetent if it creates dangers such as confusion of the issues, tendency to mislead the jury, waste of time, prejudice, undue delay, or cumulative presentation. See State v. Pipkin, 359 S.C. 322, 326, 597 S.E.2d 831, 833 (Ct. App. 2004). See also, Rule 403, SCRE.

At a minimum, the evidence here about the shoes and the internet was going to be confusing to the jury. The admitted shoes internet evidence in this case should not have been admitted because it was not properly connected with the robbery, it was irrelevant, incompetent, and confusing. There was an insufficient connection between the evidence and the crime with which appellant was charged, and the cumulative prejudicial effect of such speculative evidence far outweighed its probative value.

In State v. McConnell, 290 S.C. 278, 350 S.E.2d 179 (1986), the shooting occurred at a Christmas party at a nightclub on December 14, 1963. The deceased was fatally shot with a .357 caliber bullet while outside an apartment. McConnell's defense was that the shooting was accidental.

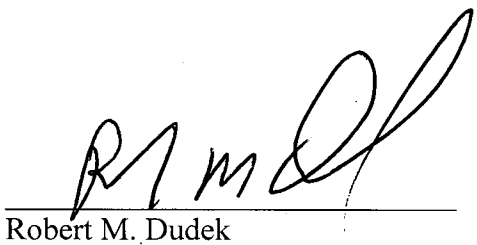
Approximately a month after the shooting, police recovered a .22 caliber slug lodged in a wall behind a closet. No testimony established when the closet was built. The other .22 caliber bullet was removed from the ceiling. It was undisputed the .22 caliber pistol introduced into evidence was not in McConnell's possession at the time of the shooting incident. The two .25

caliber bullets were found in an air conditioning unit. No evidence was introduced showing McConnell ever owned or used a .25 caliber weapon, and no such weapon was found. The Supreme Court found that there was no sufficient foundation linking this evidence to the shooting and that it was incompetent, inadmissible, and highly prejudicial. State v. McConnell, 290 S.C. 278, 350 S.E.2d 179 (1986)

With the exception of the evidence in McConnell *also* suggesting prior bad acts, there was not any meaningful difference between the speculation this internet shoes evidence invited, and the evidence in McConnell. Appellant should be granted a new trial.

CONCLUSION

By reason of argument one, a verdict of acquittal should be issued. In the alternative, appellant's convictions should be reversed based on issues two through five, and this case remanded to the Dorchester County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of October, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 16, 2017

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on
Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330